STATE OF MICHIGAN

COURT OF APPEALS

GARY CONANT and BONNIE ATKINS-CONANT, Individually and as Next Friend of OWEN CONANT, a Minor

Plaintiffs-Appellees-Cross-Appellants,

v

STATE FARM FIRE & CASUALTY COMPANY,

Defendant-Appellant-Cross-Appellee,

and

LUHRING BUILDING COMPANY, INC.,

Defendant.

UNPUBLISHED
May 23, 2006

No. 260524
Wayne Circuit Court
LC No. 03-312959-NO

Before: Murphy, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

Defendant State Farm appeals as of right the judgment entered pursuant to a jury verdict in this action involving plaintiffs' claim of negligence against State Farm and defendant Luhring Building Company, Inc. Plaintiffs also challenge rulings by the trial court in their cross appeal. We affirm.

The jury found State Farm 20 percent at fault, Luhring 30 percent at fault, and plaintiffs 50 percent at fault with respect to plaintiffs' negligence action against defendants arising out of mold spore contamination of plaintiffs' home allegedly caused by State Farm's claims adjuster and Luhring during a period when defendants were responding to and investigating an insurance claim filed by plaintiffs. Plaintiffs alleged that State Farm's adjuster, Herbert Samek, directed Robert Luhring to cut holes in the north interior wall of their bedroom so that Samek could locate the source of water damage in his effort to determine whether the damage was covered under plaintiffs' homeowner's policy. Eventually, Luhring tore open the whole interior north bedroom wall. Plaintiffs contended that the act of cutting holes in the bedroom wall without implementing containment measures constituted negligence because defendants had knowledge that there existed water damage and evidence of mold. According to plaintiffs, cutting the holes

disturbed and dislodged dormant mold spores that, until then, had been contained, and upon disruption, the mold spores became hazardously airborne throughout the home and caused a health danger and damage to real and personal property. Plaintiffs left the home permanently soon thereafter when their child became ill, allegedly as a result of exposure to the mold spores. The jury found $55,000 in total damages, which included $25,000 in personal property loss damages, $20,000 in damages for lost equity in the home, and $10,000 in damages for additional expenses, along with finding that Luhring acted as an agent for State Farm in making the holes. A breakdown of the verdict, after consideration of fault as indicated above, reflected an $11,000 award in favor of plaintiffs against State Farm and a $16,500 award in favor of plaintiffs against Luhring, but, because of the jury's conclusion that Luhring acted as State Farm's agent, State Farm was actually held responsible or liable for $27,500, which is the dollar amount expressly provided for in the judgment against State Farm. The judgment also includes the $16,500 verdict against Luhring, along with a provision indicating that any payment by Luhring will reduce State Farm's liability *pro tanto*.

I. Standard of Review and Summary Disposition and Directed Verdict Tests

For the most part, State Farm's appellate arguments assert error at both the summary disposition and directed verdict stages of the proceedings premised on a particular claim, e.g., State Farm argues that the court erred in denying its motions for summary disposition and directed verdict because plaintiffs failed to present a factual question on causation before and at trial. This Court reviews de novo a trial court's ruling on a motion for summary disposition and its decision on a motion for directed verdict. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004); *Thomas v McGinnis*, 239 Mich App 636, 643; 609 NW2d 222 (2000).

MCR 2.116(C)(10), which is the relevant provision at issue here, provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Similarly, in deciding a motion for directed verdict, the trial court must examine and review all of the evidence presented up to the time of the motion in a light most favorable to the nonmoving party, grant the nonmoving party every reasonable inference, and resolve any conflict in the evidence in that party's favor when determining whether a factual question exists. *Thomas*, *supra* at 643-644. "A directed verdict is appropriate only when no factual question exists regarding which reasonable minds may differ." *Id.* at 644.

II. Tort versus Contract and the Issue of Duty

State Farm first argues that the tort action should have been dismissed because the negligence claim was based entirely on duties set forth in the underlying contract of insurance and not a duty separate and distinct from the contract. Therefore, according to State Farm, no

independent tort action for negligence exists, and a negligent breach of contract action is not recognized in Michigan. State Farm's argument lacks merit.

We first note that, in support of its argument, State Farm relies on an unpublished case and a concurring opinion in *Burnside v State Farm Fire & Cas Co*, 208 Mich App 422, 432; 528 NW2d 749 (1995).[1] The case that is most instructive on this issue is a fairly recent ruling from our Supreme Court in *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004), in which the plaintiff fell and injured her ankle while walking across a parking lot that was covered by snow and ice. The parking lot was owned by Comm-Co Equities, and Creative Maintenance Limited (CML) had contracted with Comm-Co to provide snow removal and salting services for the lot. The plaintiff claimed that CML breached its contract with Comm-Co by failing to perform its contractual duty of plowing and salting the parking lot.[2] The plaintiff alleged no duty owed to her independent of the contract. The jury awarded the plaintiff compensatory damages after finding that CML had been negligent by failing to perform its duties under the contract with Comm-Co and that CML's negligence was the proximate cause of the plaintiff's injuries. *Id.* at 462, 468.

The Supreme Court, reversing this Court's decision affirming the jury verdict, held that the plaintiff's claim failed, as a matter of law, because CML owed no duty to the plaintiff. *Id.* at 469-470. The Court noted that the threshold question in any negligence action is whether the defendant owed a duty to the plaintiff. *Id.* at 463. Without the existence of a duty, there can be no tort liability. *Id.* The *Fultz* Court acknowledged that "[i]f one voluntarily undertakes to perform an act, having no prior obligation to do so, a duty may arise to perform the act in a nonnegligent manner." *Id.* at 465 (citations omitted). Quoting *Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967), the Supreme Court stated:

> "[W]hile [a] duty of care, as an essential element of actionable negligence, arises by operation of law, it may and frequently does arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, *and that a negligent performance constitutes a tort as well as a breach of contract*." [*Fultz, supra* at 465 (emphasis added).]

The Court proceeded with its analysis, stating:

> This Court and the Court of Appeals have defined a tort action stemming from misfeasance of a contractual obligation as the "violation of a legal duty separate and distinct from the contractual obligation."

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[1] We note that *Burnside* was a breach of contract action, and the majority held that "the application of the American rule precludes the recovery of attorney fees incurred as the result of an insurer's bad-faith refusal to pay a claim." *Burnside, supra* at 424.

[2] A default judgment was entered against Comm-Co.

> We believe that the "separate and distinct" definition of misfeasance offers better guidance in determining whether a negligence action based on a contract and brought by a third party to that contract may lie because it focuses on the threshold question of duty in a negligence claim. As there can be no breach of a nonexistent duty, the former misfeasance/nonfeasance inquiry in a negligence case is defective because it improperly focuses on whether a duty was breached instead of whether a duty exists at all.
>
> Accordingly, the lower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a "separate and distinct" mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie. [*Id.* at 467 (citations omitted).]

Because the plaintiff had not alleged a duty owed to her independent of the contract, the plaintiff failed "to satisfy the threshold requirement of establishing a duty that CML owed to her under the 'separate and distinct' approach[.]" *Id.* at 468.

Here, plaintiffs *were* a party to a contract with State Farm, and they alleged a duty separate and distinct from the contract. State Farm undoubtedly had a contractual obligation to investigate plaintiffs' insurance claim, make an inspection of the premises, and render a coverage determination. However, as made abundantly clear in *Fultz* and *Clark*, the fact that State Farm had a contractual duty to investigate the claim and make an inspection did not absolve it from tort liability when committing misfeasance, as found by the jury, in carrying out the investigation and inspection; a duty under tort law existed to act in a nonnegligent manner and to exercise ordinary care when directing the opening of the interior bedroom wall. Plaintiffs made no claim that State Farm failed to perform under the insurance contract, rather they maintained that State Farm committed misfeasance and was actively negligent when taking steps to uncover the source or entry point of the water coming into plaintiffs' home. See *Hart v Ludwig*, 347 Mich 559, 564-565; 79 NW2d 895 (1956) (failure to exercise ordinary care in actual performance of a contractual duty supports a negligence action). To rule as suggested by State Farm would grant insurers unfettered ability, when taken to its logical extent, to act negligently, wantonly, and intentionally and conceivably destroy a home or wreak havoc all in the name of conducting an investigation on a claim, without being subject to liability simply because a contract existed between the insured and the insurer. Reversal is not warranted on this unmeritorious argument.

State Farm briefly argues that it had no legal duty to warn of the mold hazard or to warn about the dangers of exposure. A review of the lower court record reveals that plaintiffs never pursued this case as a "failure to warn" action, rather plaintiffs alleged that State Farm, through its agents and representatives, created the mold hazard and subjected plaintiffs and their property to exposure by having holes cut in the interior bedroom wall.

State Farm also alludes to an argument that it owed no duty to plaintiffs because the harm was not foreseeable. The question of whether a duty exists depends, in part, on whether it is foreseeable that the actor's conduct may create a risk of harm to the victim. *McMillan v State Highway Comm*, 426 Mich 46, 61-62; 393 NW2d 332 (1986). When reasonable minds may differ regarding the foreseeability of the risk of harm, the question is best left for the jury. *Id.* at

62-63; see also *Holland v Liedel*, 197 Mich App 60, 63; 494 NW2d 772 (1992) (whether risk of harm is foreseeable in a particular case is a question of fact for the jury); *Rodis v Herman Kiefer Hosp*, 142 Mich App 425, 429; 370 NW2d 18 (1985). Here, there was evidence of water intrusion into the interior north bedroom wall, evidence of wall dampness, evidence of mold growth, evidence that adjuster Samek was familiar with mold cases and knew a mold issue existed at plaintiffs' home, and expert testimony concerning the well-known effects of water-damaged building materials, the hazards of airborne mold contamination, and the need for containment measures when disturbing mold. This evidence was sufficient to allow the jury to consider the issue regarding the foreseeability of the risk of harm.

III. Evidence of Causation

State Farm next argues that plaintiffs failed to show that "but for" defendants' actions damages would not have occurred. This is essentially an argument that plaintiffs failed to present a factual dispute with respect to causation. State Farm contends that the home was already contaminated with mold before the holes were cut in the bedroom wall. The insurer asserts that no mold or mold spore samples were taken before October 2002, which was months after the holes were cut in the wall, that it was possible that another disturbance occurring before October 2002, but after the holes were cut, caused the contamination, that plaintiffs could not connect the October 2002 mold testing levels with the act of opening the wall, and that expert Morbach's testimony was unreliable because her testimony was conducted months after the events at issue and she could not say that the structure was unaffected before the wall was disturbed by defendants. State Farm asserts that plaintiffs' entire case relative to causation was purely speculative. We conclude that questions of fact abounded such that the issue of causation was properly left to the jury.

Proving causation requires proof of both cause in fact and proximate cause. *Case v Consumers Power Co*, 463 Mich 1, 6 n 6; 615 NW2d 17 (2000). "Cause in fact requires that the harmful result would not have come about but for the defendant's negligent conduct." *Haliw v City of Sterling Heights*, 464 Mich 297, 310; 627 NW2d 581 (2001). Cause in fact may be established by circumstantial evidence, but such proof "must facilitate reasonable inferences of causation, not mere speculation." *Skinner v Square D Co*, 445 Mich 153, 163-164; 516 NW2d 475 (1994). A plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. *Id.* at 164-165. A mere possibility of such causation is not sufficient; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict in favor of the defendant. *Id.* at 165 (citation omitted). Normally, the existence of cause in fact is a question for the jury to decide, but if there is no issue of material fact, the question may be decided by the court. *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 326; 661 NW2d 248 (2003).

While it is true that expert Morbach did not conduct tests on the home until about four to five months after the wall was disturbed by defendants, she was able to testify, consistent with her position presented through documentary evidence at summary disposition, as follows:

> What I found with the Aspergillus were levels that exceeded the detection limit of the plate, which is very, very unusual. A common number that has been reported in the literature, as well as I do find this in homes, is somewhere around

> 300. And in all cases we exceeded 5,000 in every room of this home, which that in itself told me that there was significant contamination, and also the fact that those molds that I found indoors I did not find outdoors told me that there was an internal source.
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> * * *
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> What I can say based on these results, and I have tested before, during, and after contaminated walls have been disturbed, that these types of results are not found in an indoor environment unless a contaminated surface has been disturbed. They exceed the detection limits of the plate. I could find levels maybe of five, six hundred if a mold is just growing on a wall and somebody walks by it and the air pressure differential might cause it to become airborne, but not the types of levels that I found here. In the spore trap samples we had greater than 479,000 spores per cubic meter of air, and that type of sample which isn't cultured, a typical home will only have about a thousand. These types of results were so significantly high that what I can say is they would not have been present without a disturbance to a contaminated surface.

Aside from Morbach's testimony, Mrs. Conant testified that her son became terribly ill after the holes were made in the wall, and it was essentially accepted that plaintiffs left the home after the holes were made because they were becoming ill,[3] thereby creating an inference that contamination occurred at that time. Mrs. Conant testified that her son "puffed up like a blow fish" when the walls were opened. Viewing the trial testimony and the documentary evidence submitted at summary disposition in a light most favorable to plaintiffs, especially Morbach's damaging testimony, alone and in relation to the illnesses, a reasonable inference arises, beyond mere speculation and conjecture, that the act of cutting holes in the wall caused a widespread and toxic contamination of mold throughout the home. Although there was evidence that mold may have existed in the home before the holes were cut, Morbach's testimony revealed that a significant event, such as cutting the holes, was necessary to trigger widespread contamination at the high levels that she observed and quantified, and there was no evidence of illnesses before the holes were made, nor was there evidence that any significant structural events occurred that may have caused the extensive contamination after the holes were made and before Morbach conducted her tests. From the evidence arose a reasonable inference that defendants created a risk of harm or greatly increased the risk of harm. Minimally, reasonable minds could differ, and therefore a jury question on causation existed.[4] Reversal is unwarranted.

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[3] The parties stipulated to a dismissal without prejudice of any claims regarding physical injuries arising from the contamination, and thus State Farm objected on various occasions at trial when the testimony delved into physical harm. But the trial court made clear to State Farm that if it any way challenged the reasons plaintiffs left their home, plaintiffs would be permitted to elicit evidence of physical injury to make the connection.

[4] We also reject State Farm's argument that Morbach's testimony was unreliable and thus should not be considered under MRE 702. We find no support in the record to conclude that her

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IV. Agency

State Farm argues that the pleadings did not indicate that plaintiffs sought to hold State Farm liable under an agency theory with respect to the acts of Luhring, and that there was inadequate evidence of agency presented at trial. Therefore, the trial court, faced with State Farm's objection placed on the record, erred in instructing the jury on agency. Instructions should not go beyond matters put in issue by the pleadings and supported by the proofs. *Winchester v Meads*, 372 Mich 593, 598; 127 NW2d 337 (1964); *Sakorraphos v Eastman Kodak Stores, Inc*, 367 Mich 96, 99; 116 NW2d 227 (1962).

Our review of the complaint reflects that, while plaintiffs appeared to be pursuing State Farm solely on the basis of its liability for the acts of its agent Samek, the complaint repeatedly makes general reference to "State Farm, it agents, representatives and employees" when touching on the elements related to a negligence action. The complaint also indicated that Samek required that holes be cut in the wall before coverage was determined and that Luhring proceeded to cut the holes; this suggests an agency relationship. A complaint must contain "the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." MCR 2.111(B)(1); *Iron Co v Sundberg, Carolson & Assoc, Inc*, 222 Mich App 120, 124; 564 NW2d 78 (1997). Under our rule of general fact-based pleading, the only facts and circumstances that must be pleaded with particularity are fraud and mistake. MCR 2.112; *Iron Co, supra* at 124.

It is arguable whether plaintiffs' complaint reasonably apprised State Farm that plaintiffs sought to hold it liable as a principal for the acts of Luhring under an agency theory. Under such circumstances, we are not prepared to reverse the trial court's ruling, given that our review of a trial court's decision regarding jury instructions and the meaning and scope of the pleadings is generally for an abuse of discretion. *Dacon v Transue*, 441 Mich 315, 328; 490 NW2d 369 (1992); *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61, 87; 697 NW2d 558 (2005). Moreover, MCR 2.118(C)(1) provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment." In plaintiffs' response to State Farm's motion for summary disposition, they expressly argued that State Farm was liable for the negligence of "its agents Samek and Luhring[.]" Further, the testimony at trial revolved around Samek directing Luhring to cut the holes in the wall and dealt with the authority of the parties to employ Luhring. Thus, we find that the issue of agency was tried with the implied consent of State Farm.

With respect to the evidence of agency presented at trial, jury instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). If there was insufficient evidence to support an instruction, reversal is

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testimony and conclusions were the product of unreliable principles and methods or based on insufficient facts or data or that she applied the principles and data to the facts of the case in an unreliable method. MRE 702.

warranted if the error resulted in such unfair prejudice that the failure to vacate the jury verdict would be inconsistent with substantial justice. *Id.*

In *Meretta v Peach*, 195 Mich App 695, 697-700; 491 NW2d 278 (1992), this Court, setting forth the basic principals regarding agency, stated:

> An agency relationship may arise when there is a manifestation by the principal that the agent may act on his account. The test of whether an agency has been created is whether the principal has a right to control the actions of the agent.
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> The authority of an agent to bind the principal may be either actual or apparent. Actual authority may be express or implied. Implied authority is the authority which an agent believes he possesses. After the agency relationship and the extent of the agent's authority have been shown, the principal has the burden of proving that the agent's authority was limited.
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> An agent has implied authority from his principal to do business in the principal's behalf in accordance with the general custom, usage and procedures in that business. However, the principal must have notice that the customs, usages and procedures exist.
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> * * *
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> [A]pparent authority may arise when acts and appearances lead a third person reasonably to believe that an agency relationship exists.
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> Apparent authority must be traceable to the principal and cannot be established by the acts and conduct of the agent. In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances.
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> * * *
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> "Whenever a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of the principal the particular act, and such particular act has been performed, the principal is estopped from denying the agent's authority to perform it." [Citations omitted.]

Here, there was evidence that Luhring was used by State Farm to perform insurance-related repair services, that Samek determined that it was necessary to open up the wall in order to make a coverage decision, that Samek told Luhring to cut holes in the wall, and that Luhring proceeded to cut the holes in the wall at Samek's behest. There was a manifestation by State Farm, through Samek's direction, that Luhring was acting on State Farm's account. State Farm, again through Samek, clearly controlled the actions of Luhring with respect to the particular act

of investigating the claim by cutting holes in the wall; therefore, we conclude that the trial court did not err in instructing the jury on agency as there was supporting evidence for the instruction.

V. Mitigation of Damages

State Farm argues that plaintiffs failed to mitigate their damages by abandoning the family home and leaving behind most of their personal property. It is well settled that an injured party has a duty to exercise reasonable care to minimize damages. *Klanseck v Anderson Sales & Services, Inc*, 426 Mich 78, 91; 393 NW2d 356 (1986); see also *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 15; 516 NW2d 43 (1994) (a plaintiff must mitigate his or her loss). It is, however, the defendant's burden to prove that the plaintiff failed to mitigate damages. *Id.* The defendant must show that the plaintiff failed to employ every reasonable effort to mitigate damages. *Dep't of Civil Rights v Horizon Tube Fabricating, Inc*, 148 Mich App 633, 637; 385 NW2d 685 (1986).

Viewing the evidence in a light most favorable to plaintiffs, State Farm failed to sustain its burden on the claim that plaintiffs did not mitigate their damages. With respect to the home, there was evidence that plaintiffs attempted to market and sell it, but, in the words of Mrs. Conant, "No one wanted it." She also stated that the cost to repair the house was more than it was worth. Plaintiffs' expert Morbach testified extensively to the dangerously high levels of mold spore contamination throughout the house, and there was evidence that cleaning or decontamination costs associated with this type of incident would not be cost effective. There was also evidence of illnesses apparently brought on by the contamination. While plaintiffs eventually stopped paying the mortgage on the home, this fact cannot be deemed unreasonable under the circumstances presented. State Farm did not set forth any evidence regarding other courses of action that plaintiffs could and should have taken. With respect to the personal property, there was evidence from expert Morbach that the airborne mold spores would have fallen throughout the home contaminating everything below. The contamination levels were so exceptionally high, a juror could reasonably infer that property in the home was severely contaminated. There was further evidence that cleaning the personal property, in light of the necessary testing and the intricate process involved, would not be cost effective when considering the value of the property, and, according to plaintiffs' witness, adjuster Henry Orr, the property for which plaintiffs sought compensation were "all total loss items." Again, State Farm did not set forth any evidence regarding other reasonable courses of action that plaintiffs could and should have taken. Reversal is unwarranted.

VI. Damages

State Farm argues that plaintiffs failed to establish damages because there was no evidence that plaintiffs' personal property was actually contaminated and no evidence of lost equity in regard to the home. In *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995), this Court stated:

> A party asserting a claim has the burden of proving its damages with reasonable certainty. Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision. It is sufficient if a reasonable basis for computation exists, although the result be only approximate. Moreover, the

> certainty requirement is relaxed where the fact of damages has been established and the only question to be decided is the amount of damages. [Citations omitted.]

With regard to the contamination of personal property, although there was no testimony that particular items or pieces of property had been tested and found to be contaminated, Morbach's testimony about the insidious and extensive contamination of the home, with remarkably and unusually high levels of Aspergillus, and her testimony that the mold spores would have fallen throughout the home contaminating everything below, could lead a juror to reasonably infer that the personal property in the home was severely contaminated.

Concerning the issue of lost equity, Mrs. Conant testified that at the time of the contamination plaintiffs owed $60,000 on the house, but plaintiffs failed to provide admissible evidence regarding the home's value at the time or its current value. Mr. Conant testified that when he divorced his ex-wife in 1992, he was required to pay her half the equity in the marital home, which is the house involved in this suit, and said amount was $25,000. Conant additionally testified that it would have cost about $5,000 to make repairs on the inner and outer bedroom walls to correct any water leakage problems before the holes were cut in the interior wall. It is conceivable that the jury used these numbers to patch together a dollar amount in setting the damages for lost equity, and we find nothing inherently unreasonable with that approach. While such a computation appears somewhat strained, we are not prepared to reverse, especially considering that plaintiffs had established contamination damage to the home.[5]

VII. Case Evaluation Sanctions (Cross Appeal)

Plaintiffs argue that the trial court erred in not awarding them case evaluation sanctions where judgment was entered in their favor for $27,500, when including that portion of the verdict against Luhring on the basis of agency, and where the $15,000 case evaluation was rejected by State Farm. The trial court denied case evaluation sanctions to both parties because Luhring did not participate in case evaluation. The decision to award or deny case evaluation sanctions is an issue of law that we review de novo. *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212, 218; 625 NW2d 93 (2000); *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000).

MRE 2.403(O)(1), which addresses cases involving multiple parties, provides:

> If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

[5] We also note that it is likely that the actual lost equity was more than the $20,000 awarded.

A verdict includes "a jury verdict[.]" MRE 2.403(O)(2). The verdict must be adjusted by adding to it assessable costs and interest. MRE 2.403(O)(3). After adjustments, the verdict is considered more favorable to a plaintiff if it is more than 10 percent above the evaluation. *Id.* MRE 2.403(4) provides in relevant part:

> (a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. . . .
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> (b) If the verdict against more than one defendant is based on their joint and several liability, the plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than the total case evaluation as to those defendants . . . .

For purposes of awarding case evaluation sanctions under MRE 2.403(O), a verdict must represent a finding of the amount that the prevailing party should be awarded. *Marketos v American Employers Ins Co*, 465 Mich 407, 414; 633 NW2d 371 (2001). "The dollar amount that the jury includes on the verdict form may or may not be the 'verdict' for that purpose." *Id.* The *Marketos* Court concluded that legal adjustments to the jury's findings made by the trial court ultimately controlled the determination of what constituted the "verdict" relative to case evaluation sanctions. *Id.* at 414-415. The Court held that "the actual 'verdict' was the decision by the court using the jury's factual findings." *Id.* at 415. Here, the jury verdict against State Farm and in favor of plaintiffs was $11,000, but because the jury also found that Luhring acted as State Farm's agent, the judgment was increased to $27,500, which included the jury's $16,500 verdict against Luhring. We consider the amount of $27,500 as representing the "verdict" in this case. However, we find no error in the trial court's ruling because, regardless of the theory pursuant to which plaintiffs proceeded, i.e., agency, State Farm and Luhring are, in effect, jointly and severally liable for $16,500 of the judgment entered, thereby implicating MRE 2.403(O)(4)(b). Indeed, the judgment itself provides that "any amounts paid by Defendant, Luhring Building Company, Inc. [on the $16,500 verdict against it], shall reduce Defendant, State Farm Fire and Casualty Company's liability *pro tanto*." In that situation, MRE 2.403(O)(4)(b) clearly indicates that the "plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than *the total case evaluation as to those defendants*." (Emphasis added.) Luhring, however, did not participate in case evaluation so there does not exist a "total" case evaluation as to "those" defendants. Accordingly, we find no error with the trial court's decision to deny plaintiffs' request for case evaluation sanctions.[6]

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[6] We note that this case presented an unusual situation in that fault was allocated by the jury and the jury found both the agent (Luhring) and the principal (State Farm) liable, where typically, an agent for a disclosed principal cannot be held liable, *Riddle v Lacey & Jones*, 135 Mich App 241, 247; 351 NW2d 916 (1984). Luhring's failure to appear in this action in any manner, and the failure to default Luhring, caused the unusual situation confronting this panel.

VIII. Evidence of Market Value (Cross Appeal)

Finally, plaintiffs argue that the trial court erred in not allowing Mrs. Conant to testify regarding the alleged sale of "comparables" in the vicinity of plaintiffs' home, which testimony plaintiffs wished to utilize in establishing a market value for their home, and which could then be used to compute lost equity after consideration of the $60,000 amount still owed on the house at the time the holes were cut. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 196; 667 NW2d 887 (2003).

We agree with plaintiffs' contention that a lay witness is generally regarded as being competent to testify concerning the value of property if the witness is familiar with and has seen the property and has knowledge of the value of the property or of other lands in the immediate vicinity. *In the Matter of Acquisition of Land for the Central Industrial Park Project, Parcel 755*, 142 Mich App 675, 677; 370 NW2d 323 (1985); *Grand Rapids v H R Terryberry Co*, 122 Mich App 750, 753; 333 NW2d 123 (1983); *Equitable Bldg Co v Royal Oak*, 67 Mich App 223, 226; 240 NW2d 489 (1976). The problem that existed here, as recognized by the trial court, was the lack of foundation necessary to show that Mrs. Conant was in fact familiar with the other properties in sufficient detail such that her testimony on value would have any meaning. There is no indication in the record that Mrs. Conant was prepared to testify regarding the specific characteristics of the other homes. Moreover, Mrs. Conant was apparently going to testify on the basis of a conversation with a real estate agent who gathered computer-generated information on the matter on Conant's behalf. This would create evidentiary problems with respect to personal knowledge, MRE 602 and 701, and hearsay, MRE 801. Although it may be arguable that the trial court's concerns went more to weight and credibility as opposed to admissibility, we cannot conclude that the court abused its discretion in excluding the testimony.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Christopher M. Murray